concurrently, and, on count 4, to pay a fine of $5,000 (R. 81). Petitioner Kastner was acquitted on count 2 and convicted on counts 4 and 5 (R. 188). He was sentenced to three years' imprisonment on each of the latter counts, to run concurrently, and, on count 4, to pay a fine of $2,000 (R. 81). In addition, each petitioner was ordered to pay one-third of the court costs (R. 81–82).[2]

The Court of Appeals for the Seventh Circuit affirmed the judgments of conviction (R. 213–241).

On the tax-evasion and conspiracy counts (4 and 5), the government established that petitioners and Prindable were partners in a horse race bookmaking enterprise which did business under the name of North Sales Company (R. 84–85, 93, 100–101, 105–106, 119–122, 123–129, 139–140, 142–143, 150; G. Exs. 1–10, R. 84; G. Exs. 11–14, R. 84–85; G. Exs. 15–29, Tr. 19–22; G. Exs. 116–119, R. 150–151); that for the nine-month period from July 1956 to March 1957, inclusive, the partnership filed monthly wagering tax returns reporting the gross amounts of the wagers which it claimed had been placed with it during that period, and paid as the wagering tax thereon,[3] 10 per cent of such reported gross amounts (G. Exs. 1–9, R. 84); that for the month of March 1957 the amount of wagers reported was $11,913.50, on which the tax paid was $1,191.35 (R. 146; G. Ex. 9, R. 84; Tr. 22–

[2] Prindable was convicted on counts 3, 4 and 5 (R. 188). He was sentenced to concurrent terms of three years on each, to pay a fine of $2,000 on count 4, and to pay one-third of the court costs (R. 81). His conviction was affirmed by the court of appeals (R. 213–241), but he did not petition for certiorari.

[3] See 26 U.S.C. 4401(a) (Appendix A, *infra*, p. 56).

23); and that the true amount of the wagers placed with the partnership during that month was $103,441.30, or more than eight times the amount reported (R. 143–146; Tr. 284–293).

On count 1—the false statement count pertaining to petitioner Clancy—the government proved that Clancy, at an interview on December 13, 1956, with Internal Revenue Agents Wilbur Buescher and Martin Mochel (who were conducting an inquiry into the wagering tax liability of the partnership) told these officers that the only agents of the partnership engaged in accepting wagers on its behalf were Charles Kastner (petitioner Kastner's brother) and Malcolm Wagstaff (R. 99–100, 142–143), whereas in fact there were numerous other persons accepting wagers on behalf of the partnership (R. 112, 114, 115, 116–117, 118, 119–122; Tr. 110–111, 136).

The facts pertaining to the two issues before the Court—the validity of the search and seizure, and the production of reports of government witnesses—are as follows:

THE SEARCH AND SEIZURE

The government's proof at the trial on the tax-evasion count consisted in substantial part of wagering slips, bet tickets, scratch sheets, and similar horse race bookmaking paraphernalia which were seized under a search warrant issued by United States District Judge William G. Juergens (R. 19–23, 87–92, 143–146). Petitioners unsuccessfully sought, on various grounds, both before and at the trial, to suppress the seized materials for use in evidence (R. 2, 36–40, 48–53).

FILE COPY

No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1960

THOMAS D. CLANCY AND DONALD KASTNER, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
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1. The search warrant (R. 19–21), issued May 5, 1957, covered the second floor apartment at 2300A State Street, East St. Louis, Illinois, which was above "Zittel's Tavern." The warrant directed the search of the described premises for, and the seizure if found of, "divers records, to wit, books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business", "receptacles in the nature of envelopes in which there is kept money won by patrons who have won wagers or bets made at said place of business", and "divers other tools, instruments, apparatus, United States currency and records". All of this property, the warrant stated, was used and intended for use in such business and as a means of committing criminal offenses against the United States, namely, willfully attempting to evade and defeat the payment of the special tax of $50 per year payable by each person engaged in the business of accepting wagers, as required by 26 U.S.C. 4411 (Appendix A, *infra,* p. 56), and willfully failing to register as a person so engaged, as required by 26 U.S.C. 4412 (Appendix A, *infra,* pp. 56–57) (R. 20–21).

Probable cause for the belief that the property described was concealed on the premises and was being used illegally was based, the warrant stated (R. 20–21), on an affidavit by agent Glenwood Johnson of the Internal Revenue Service (R. 5–11) and affidavits by other officers of the Service which were referred to and incorporated by reference in Johnson's affidavit (R. 11–18). The affidavits detailed personal observa-

tions and activities of the affiants which indicated that a horse race bookmaking operation was being conducted on the premises and that the premises had not been registered for the carrying on of any wagering business. The pertinent allegations of the affidavits may be summarized as follows:

Agent Johnson stated that he had personally placed horse race bets at Zittel's Tavern with one "Heine" and the bartender, one "Murphy", on different occasions during the months of March and April 1957 (R. 7–8); that on one occasion, in March 1957, he observed a woman enter the tavern and give Heine money envelopes, a racing form and a scratch sheet, whereupon Heine walked to a doorway behind the bar which led upstairs, placed the envelopes in a stairwell area, and closed the door (R. 8); that he (Johnson), after waiting a short while following this incident, told Heine that he "had an envelope coming", whereupon Heine returned to the door, opened it, picked up an envelope, and handed it to Johnson (*ibid.*); and that the envelope had the amount "$9.60" written on it and contained the winnings on a wager placed by Johnson on a prior occasion (*ibid.*). Johnson further stated that he had observed on the bar, under the bar, on the back bar, in the stairwell, and elsewhere in the tavern, paraphernalia commonly used in the operation of a wagering business involving the taking of bets on horse races, namely, scratch sheets, racing forms, currency, and small pads of paper approximately four by six inches in dimension (R. 10).

Agent Norman Mueller stated that on one occasion in April 1957 he observed a man, carrying a canvas sack similar to sacks furnished by banks to carry money, enter Zittel's Tavern, speak to the bartender, go behind the bar, and pass through the door leading upstairs (R. 14).

Agent Donald Yerly stated that on or about May 1, 1957, at approximately 7:09 a.m., he observed a man known to him as Charles J. Kastner, Jr., "a well known bookmaker", enter Zittel's Tavern (R. 14–15; see also R. 16); and that nine minutes later he saw a man known to him as James F. Prindable (petitioners' co-defendant), another "well known bookmaker", enter the tavern (R. 15). Agent William Ryan stated that Prindable, upon entering the tavern, went behind the bar and through the door leading upstairs (R. 17). Agent Yerly further stated that on or about May 2, 1957, he "personally examined a Special Tax Return and Application for Registry—Wagering (Form 11-C) filed by the aforesaid Charles J. Kastner, Jr., and James F. Prindable on June 29, 1957,[4] which stated therein that their business address was 2401 Ridge Avenue, East St. Louis, Illinois" (R. 15; see also R. 17).

Agent Allan Busch stated that, according to the toll call records of the Illinois Bell Telephone Company, Collinsville, Illinois, for the period from August 1956 to January 1957, twenty-one telephone calls were made from the William Blaha Tavern in Collinsville—the headquarters of a horse race bookmaking operation in that city (see R. 18)—to "Bridge 1-0448,

[4] This should be "1956".

which is a telephone subscribed to by John Leppy, 2300A State Street, East St. Louis, Illinois" (R. 16).

Joseph Heckelbech, Chief of the Collections Division in the Office of the District Director of Internal Revenue at Springfield, Illinois, stated in his affidavit (R. 11–13) that he had custody of the records for that district pertaining to federal wagering taxes, including the special annual tax of $50 payable by each person engaged in the business of accepting wagers (R. 12); that he had examined all such records covering the fiscal year ending June 30, 1957 (*ibid.*); and that there was "no record in said office for said fiscal year of a return having been filed by the operator of the place of business carried on in part in the premises known as 2300A State Street, East St. Louis, Illinois, covering John L[e]ppy, Henry D. Zittel or any other person engaged in the business of accepting wagers or engaged in receiving wagers for or on behalf of any other person in said premises or any part of said premises" (R. 12–13).

2. The search warrant was executed on May 6, 1957, by agent George Kienzler and a number of other agents, who found on the premises, and seized, a large quantity of horse race bookmaking paraphernalia (R 88–89). Kienzler's return to the warrant listed among the articles seized scratch sheets, racing forms, turf programs, deposit tickets, a checkbook, telephone bills, approximately $2,000 in packages of small bills, approximately $160 in rolls of coins ranging from pennies to half-dollars, and miscellaneous notes, records, notebooks, pads, etc. (R. 22–23). Some of the information taken from the seized materials was pre-

sented to the grand jury which returned the indictment (R. 41), and some of the materials were received in evidence at the trial and constituted essential parts of the proof on the tax-evasion count.

At the time of the seizure, petitioner Kastner, who was present on the premises, was asked by Kienzler "if he had a wagering stamp or occupational tax stamp". Kastner replied that "he didn't have one personally", but that he was "a partner of the North Sales Company", of which "Thomas Clancy and James Prindable were the other partners", and that the partnership did have a stamp, which Clancy "took care of" (R. 93; Tr. 73). Kienzler did not determine at that time whether the North Sales Company had a tax stamp, but simply obeyed the command of the warrant (R. 94).

3. On August 14, 1957 (R. 2), petitioners and Prindable filed a motion for the return of the seized property and to suppress its use as evidence. They contended, *inter alia*, that the warrant was insufficient on its face; that there was no probable cause for believing the existence of the grounds on which it was issued; and that none of the property listed in the warrant was designed or intended for use, and none had been used, as means or instrumentalities for committing an offense (R. 36–37).

A supporting affidavit (R. 37–40) by petitioners and Prindable filed September 16, 1957, alleged that the property seized under the search warrant belonged to the affiants and constituted their books, records, private papers, documents and money (R. 39–40); that the affiants had been engaged in the business of

accepting wagers under the name of North Sales Company for several years prior to the fiscal year ending June 30, 1957 (R. 37); that for each such year they prepared and filed with the District Director of Internal Revenue at Springfield, Illinois, a Special Tax Return and Application for Registry—Wagering (Form 11–C) and paid the tax due thereon (*ibid.*); that on or about June 29, 1956, they similarly prepared and filed an application for registry for the fiscal year ending June 30, 1957, paid the tax due thereon, and received from the District Director, in their individual names and under the name of North Sales Company, a wagering stamp (*ibid.*); that on the application for registry last mentioned they listed as persons accepting wagers for them Charles Kastner and Malcolm Wagstaff (R. 38); that the Charles Kastner so listed was the same person as the Charles J. Kastner, Jr., referred to in the affidavit (see *supra*, p. 8) filed with the application for the search warrant (R. 38); that in their application for registry they "listed their place of business 'at large' and did in fact operate at various and numerous locations from time to time" (*ibid.*); that in December 1956 Internal Revenue Agents Martin O. Mochel and W. L. Buescher, who at that time examined the books of account of the affiants, were informed by them that they operated their business "at various and numerous locations" (*ibid.*); that this fact "was known to the District Director of Internal Revenue for several years last past," and the "information was indicated on" the application for registry which they had filed "for said years aforesaid" (R. 38–39); that they were

advised by the District Director by letter dated April 17, 1957; following the agents' examination of their books, that the examination (covering the period January 1955 to December 1956, inclusive) disclosed that no change was necessary in the tax reported for this period and that their returns for this period would be "accepted as filed" (R. 39); and that they had "never given 2401 Ridge Avenue, East St. Louis, Illinois, as the business address of North Sales Company and did not in fact conduct any business there, said address being the home of Thomas D. Clancy" (*ibid.*).

In a brief filed in support of their motion for return and to suppress, petitioners and Prindable appended, as Exhibits A, B, and C, respectively, copies of (1) their application for registry for the fiscal year ending June 30, 1957, (2) their special tax stamp for that year, and (3) the letter from the District Director, dated April 17, 1957, advising them that no change was necessary in the tax reported for the period January 1955 through December 1956. It was subsequently stipulated (R. 41–42) that these exhibits should be deemed to have been received in evidence, without objection, in support of the motion.

Exhibit A, the application for registry for the fiscal year ending June 30, 1957,[1] signed by petitioner Clancy as "Partner", gave the applicant's "True name" and "trade name, if any", as "Donald Kastner, James Prindable & Thomas Clancy d/b/a North Sales Company." The "Business" address of the company was given as "2401 Ridge Ave—E. St. Louis, Ill." Immediately before this address, on the same

[1] This document is the same as the government's trial exhibit 14, R. 84–85.

line, were the words "at Large", which were crossed out in pencil.* The application described petitioners and Prindable as partners in the company and gave the "Home address" of each. Clancy's home address was given as "2401 Ridge Ave—E. St. Louis, Ill."—the same address as was given for the company's business address. Item 5 on the application form asked whether the applicant was "engaged in the business of accepting wagers on your own account", and, if so, to state the "Name and address where each such business is conducted"; space for the filling in of four such locations was provided on the form. This item was answered "Yes", and in the space provided for the remainder of the information requested only the words "At Large" (undeleted in this instance) appeared. Charles Kastner was listed as one of two

*It does not appear when or under what circumstances the words "at Large" on this line were crossed out (see R. 85–87, 140–142; Tr. 23–28, 271–274). Press Waller, the accountant who prepared the application on the partnership's behalf (R. 139), testified at the trial that the words were not crossed out when he filed the application and that the application was not returned to him for correction (R. 141). Mr. Heckelbech, the chief of the Collections Division in the Springfield office of the Internal Revenue Service (R. 84), testified that a stamp might be issued to an applicant permitting him to do business "at large", or at a given address, but "not at both" (R. 86; Tr. 25, 26–27). If an application were received which was not correctly made out, Heckelbech said, the taxpayer would be asked to correct it, and no stamp would be issued until the correction was made (R. 86; Tr. 26–27). As we point out in the text (*infra*, p. 14), the stamp which was issued to North Sales Company gave the address of the company as 2401 Ridge Avenue, East St. Louis, Illinois (D. Ex. 2, Tr. 327–328). The latter address was in fact petitioner Clancy's residence address (G. Exs. 11–14, R. 84–85; R. 39).

agents of the partnership who were engaged in receiving wagers on its behalf.

Exhibit B, the special tax stamp issued to the North Sales Company for the fiscal year ending June 30, 1957,[1] bore on its face the name and address of the taxpayer as follows:

> NORTH SALES COMPANY
> KASTNER DONALD—PRINDABLE JAMES—CLANCY THOMAS
> 2401 RIDGE AVE
> E ST LOUIS ILL

An instruction printed on the face of the stamp read:

> Upon change of ownership, control, address, or location notify your District Director immediately.

Another instruction on the stamp read:

> This stamp * * * must be posted in the taxpayer's place of business. If he has no fixed place of business, he must carry the stamp on his person and exhibit it; upon request, to any officer or employee of the Internal Revenue Service. * * *

Exhibit C, the District Director's letter of April 17, 1957, was addressed to:

> Mr. D. Kastner,
> Mr. J. Prindable and
> Mr. T. Clancy
> d/b/a North Sales Co.
> 2401 Ridge Avenue
> East St. Louis, Illinois

[1] This document is the same as the defendants' trial exhibit 2, Tr. 327–328.

4. On July 28, 1958 (R. 3), the district court denied the motion for return and to suppress (R. 43). The court held that the warrant was sufficient on its face (R. 49–51); that there was probable cause for its issuance (the reasonable belief that an offense, the carrying on by some one of a wagering business without having registered and paid the special tax of $50 per year payable by each person engaged in such business, was being committed on the premises described in the warrant) (R. 51–52); and that the items seized were not "merely the private books and records of the defendants", but were "instrumentalities in conducting the illegal operations" (R. 52; see R. 53).

THE PRODUCTION OF AGENT-WITNESSES' REPORTS

1. Agent Kienzler, who, with other agents, executed the search warrant, testified that petitioner Kastner was present on the premises at the time and that he answered various questions. Kienzler testified that, in response to the question what he was doing there, Kastner "replied he was just waiting for one or more phone calls"; although Kienzler asked him "what kind of phone calls he was waiting for," Kastner "did not say" (Tr. 41–42; R. 89–90). In response to the question whether "he had a wagering stamp or occupational tax stamp," Kastner "said he, personally, did not have one but that the partnership, the North Sales Company had a stamp and that Tom Clancy took care of it" (Tr. 50; R. 93). Kienzler further testified:

> A. He [Kastner] stated he was a partner in North Sales Company and that he served as a

clerk and worked on a commission of the profits; that Thomas Clancy and James Prindable were the other partners in North Sales Company; that he, himself, did not have anything to do with the records and that Tom took care of that. I asked him several times who the agents were of North Sales Company and he replied he did not know them by name so I asked him who his most frequent customers were, and again he replied he didn't know them by name but he stated a few initials which I don't recall but indicating the most recent customers. I don't recall all of them but there was a James "P" and a Mrs. "P", and others.

Q. Did he, in fact, state he didn't know the names of the agents of the North Sales Company?

A. Yes. [Tr. 51; R. 93]

Defense counsel made no request for the production of any report, memorandum, or prior statement by this witness touching upon the subject matter of his testimony; nor was the witness asked whether he had made any such report or prior statement or whether he took notes during the questioning.

Agent Ira Minton, who was present during the interview between Kienzler and Kastner, likewise testified to what Kastner said in the interview (R. 96–97; Tr. 72–74). Minton's account was as follows (Tr. 73–74):

Mr. Kienzler asked Mr. Kastner what his occupation was and Mr. Kastner stated he was a junior partner and clerk in a partnership with Tom Clancy and James Prindable. He stated he had been a partner about three years and

prior to that time, he had been a clerk or agent in their wagering activities most of his life. He was asked what his duties were and he stated he answered the telephone and took bets. He also stated that he did not collect any money. He was asked to name, or if he could name any agents and he stated he did not know any of the agents by name.[8] He was asked if he could name any customers and he stated he could not name them by name but he gave some initials that he knew.

At the conclusion of Minton's direct testimony, defense counsel requested, pursuant to 18 U.S.C. 3500, "the production of any statements and reports made by the witness, Ira Minton; for the purpose of inspection and to use to facilitate the cross-examination of said witness, which relates to the subject matter this witness has testified to" (R. 97). The court ruled that the request would be "allowed in so far as Ira Minton wrote [anything] down contemporaneously with the making of any statement of the defendant, Kastner, to this witness", but would be denied with respect to "any report this witness, Minton, made to his superiors * * * subsequent to the conversation * * *" (*ibid.*).

During cross-examination, Minton stated that agent Kienzler took notes during the interview with Kastner, but that he himself did not take notes (R. 97; Tr. 77). Minton stated, however, that upon returning to his office he prepared a memorandum of the interview between Kienzler and Kastner in which he related his

[8] Kastner was acquitted on the false statement charge of count 2, to which this testimony pertained (R. 24–25, 188).

"knowledge of the conversation"* (R. 97, 99; Tr. 77, 83.) Defense counsel requested the production of this memorandum (R. 99). The request was denied, the court again ruling (*ibid.*):

> If the witness made the notes contemporaneously with the giving of the statement by the defendant, Kastner, to this witness, you may have it. Any statement referred to by the witness made subsequent thereto and delivered to his superiors, you may not have.
>
> * * * * *
>
> We have gone over this several times. The law says made contemporaneously with and not subsequent. * * *

2. Agent Buescher testified that on December 13, 1956, approximately five months before the execution of the search warrant, he and agent Mochel interviewed petitioner Clancy in the office of Press Waller, an accountant who assisted the North Sales Company in its tax affairs (R. 99–100, 139). Buescher testified that, in reply to questions by the agents, Clancy stated: that the partners in the North Sales Company were himself, Mr. Prindable, and petitioner Kastner; that the partnership had no particular place of business; that the address, 2401 Ridge Avenue, shown on the Form 11–C ("Special Tax Return and Application for Registry—Wagering") filed by the partnership was the address of his personal residence; that during

*A copy of Minton's memorandum (omitting portions unrelated to his account of Kastner's statements) appears as Appendix B, *infra*, pp. 62–64. Another copy, with no deletions, has been lodged with the Clerk for examination by the Court, if it so desires.

1955 and up to June 30, 1956, North Sales had but one agent working for it, Charles Kastner; that on July 1, 1956, a new agent, named Malcolm Wagstaff, was employed; that the partnership had no agents other than those two individuals;[10] that each partner and agent had a regular route which he traveled daily in the process of accepting wagers; that they did not ordinarily use the telephone to accept bets, but that "on occasions, maybe a friend of one of the partners or agents were given a number where they could be contacted by telephone to lay wagers"; that North Sales did not have a telephone; that the winning bettors were paid off by the partners; that the agents were not allowed to accept credit bets; that the partners discouraged credit betting but that certain customers were allowed to bet by credit up to $20 or $30; that he (Clancy) computed the winning amounts of money; and that each partner, when paying off winners, usually secured new wagers for that day at the same time (R. 100; Tr. 85–87, 88).

Buescher further testified that on the following day, December 14, 1956, he and agent Mochel conducted a joint interview of petitioner Kastner and Mr. Prindable (R. 100–101; Tr. 87–88). The agents asked them about their duties in the partnership, credit betting, their manner of accepting wagers, and whether they "laid off to other books" (R. 101). Prindable, who did "most of the answering", stated that they did not "lay off" to other bookmakers; that

[10] This testimony was the basis of the false statement charge of count 1 (R. 24). See *supra*, p. 3.

they "didn't even know any other bookies in town";[11] that they had a route which they covered daily, most of it on foot; that no bets were taken by telephone; and that his (Prindable's) automobile expense was so small that he did not even charge it to the partnership (R. 101; Tr. 88).

On cross-examination, Buescher testified that he took no notes during these interviews, but that agent Mochel did take notes; that, based on Mochel's notes, with "everything in" which Buescher "agreed", the agents subsequently compiled an office memorandum; that he (Buescher) signed the memorandum and it was placed in Mochel's files (R. 101–102; Tr. 89–91). Defense counsel requested the production of the memorandum (R. 101; Tr. 89–90), which request was denied (R. 102).

Agent Mochel, who was present and took part in the interviews of December 13 and 14, testified to statements made by Clancy and Prindable (R. 142–143; Tr. 280–283, 303–304). At the interview of December 13, Mochel testified, Clancy stated: that the partners in the North Sales Company were himself, Mr. Prindable, and petitioner Kastner; that the partnership had no particular place of business; that his (Clancy's) residence address, 2401 Ridge Avenue, "was the address used for the wagering tax business"; that from January 1955 through June 1956 the partnership had but one agent, Charles Kastner; that, starting in July 1956, it had another agent accepting wagers for it, Malcolm Wagstaff; and that it had no

[11] This testimony was the basis of the false statement charge against Prindable in count 3 (R. 25–26).

agents other than these two persons (R. 142–143; Tr. 281–282).

Asked to "state * * * the substance" of the statements made by Prindable during the joint interview of Prindable and petitioner Kastner on the following day, December 14, Mochel testified that he (Mochel) (Tr. 282–283; R. 143)—

> * * * asked [Prindable] his relationship he had with the deal with respect to accepting wagers and also the manner in which the wagers were paid off, whether he paid them, his own winners and he stated he did, in person. I asked him if he laid off any wagers and he stated they did not. I asked him what happened when people wanted to lay large bets with him, and he stated if the bet was too large, he just refused that bet. In the conversation, I asked him if he might recommend they call someone else to place the bet in the locality and he said he didn't even know of any other horse bookies.

On cross-examination, Mochel stated that he had prepared and signed a memorandum "as to what transpired" at the two interviews, based on "notes taken by [him] at that time" (Tr. 301–302). The following then occurred (Tr. 302–303):

> MR. O'CONNELL [defense counsel]: Your Honor, we request the statement of Mr. Mochel concerning any interviews of December 13th and 14th.
>
> THE COURT: Any long hand notes made by the witness at the time of the interview, you will turn over to the attorneys for the defendants.

(NOTE: Same produce[d] by Government Attorneys and given to defense attorneys).

Q. (Mr. O'Connell Continuing) Mr. Mochel, the first one here was with Mr. Clancy?

A. Yes, sir.

Q. Is that right, sir?

A. That is right.

Q. That was on the 13th.

A. Yes, sir.

Q. Do you have the notes taken during the interview of Prindable and Kastner which was on the 14th?

A. I think they are all there on the 14th when Mr. Prindable and Mr. Kastner were together, when they were there with Mr. Waller.

Q. Do you have those notes?

A. Yes, I believe you have the memorandum. Do you have them all?

Q. I guess you can tell me better than I. I don't know what notes you had.

A. This was with Mr. Prindable on the 14th. We talked to Mr. Clancy about their items and their method of taking bets. This had to do with that. These particular three sheets had to do with wagering of the North Sales Company.

Q. You have no notes or statement of Mr. Kastner?

A. Yes, they are in the same folder there.

MR. O'CONNELL: We request permission to inspect those, your Honor.

MR. MCKNELLY [government counsel]: Here they are.

(NOTE: Same produced and given to defense attorneys).

Q. (Mr. O'Connell Continuing) These are the onl[y] notes you took of the interview with Mr. Kastner?

A. That is right, with Mr. Donald Kastner, the defendant here.

SUMMARY OF ARGUMENT

I

The search and seizure were valid and the seized property was properly admitted into evidence.

A. There was probable cause for the issuance of the search warrant.

1. Under the statutes and regulations, "each" place where the business of accepting wagers was carried on was required to be registered.

2. The district judge who issued the warrant had probable cause to believe that 2300A State Street was a fixed place of business—if not the actual headquarters—of a day-to-day bookmaking operation which had been going on for at least several weeks and in all likelihood for a much longer period; and that whoever was conducting the business was doing so in violation of federal law because the records of the Internal Revenue Service failed to reflect that these premises had been registered. No more was necessary to the validity of a warrant authorizing the search of the premises and the seizure of the things used in committing the offense.

3. The fact that the North Sales Company, in which petitioners and defendant Prindable were partners, had paid the special $50.00 per annum occupational tax levied on persons engaged in the business of ac-

cepting wagers, and had been issued a wagering tax stamp evidencing such payment, has no relevance to the validity of the search warrant. The warrant was not directed to *petitioners'*, or the *North Sales Company's*, books and records. It was directed to specified property, located at a designated address with unknown occupants, which, there was reason to believe, was being used to operate an unregistered wagering business in violation of federal law.

B. The property was properly seized because it constituted the means of committing the offenses upon which the search warrant was based.

1. The instrumentalities of a crime—the means by which a crime is being or has been committed—are properly subject to seizure under a search warrant or as an incident to a valid arrest. The fact that the instrumentalities or means may be documentary in character is immaterial. Here, the items seized were the usual paraphernalia of a horse race bookmaking business, and the precise property that the warrant authorized to be seized. Since this business was reasonably believed to be operating in violation of federal law, the property was subject to seizure as the instrumentalities used in committing a federal offense.

2. Neither the fact that the North Sales Company had a tax stamp nor the further fact that petitioners were not indicted for the crime referred to in the search warrant (conducting a wagering business without having registered or paid the $50.00 tax) supports petitioners' contention that the latter offense had not been committed at 2300A State Street. Both

the statutes and the regulations require that "each" place of business at which the business of accepting wagers is conducted be registered. While a taxpayer who has no "principal place of business" cannot meet this requirement [redacted] North Sales Company was not in this category. For it plainly had a place of business—2300A State Street. Moreover, since North Sales Company's application for registry gave its business address as 2401 Ridge Avenue, the firm was violating the law by operating another place of business without also registering it.

C. The seized property was properly admitted in evidence against petitioners. Since, as we have shown, the books and records here involved were properly seized by the government, under a valid search warrant, as instrumentalities used in the commission of crime, their subsequent retention by the government, and use against petitioners as evidence, was also valid, even though the crimes which the seized property was used to prove were not the same crimes upon which the search warrant was based. *Gouled* v. *United States*, 255 U.S. 298; *Abel* v. *United States*, 362 U.S. 217. Here, as in those cases, no good reason was shown for prohibiting the government from using this relevant and otherwise admissible evidence.

II

We agree with petitioners that the trial court erred in denying defense motions for the production of memoranda by agent-witnesses Minton, Buescher, and Mochel wherein they reported on certain statements

made by one or both petitioners in interviews, which statements were also the subject of the agents' testimony. Each of these memoranda was "a written statement made by said witness and signed or otherwise adopted or approved by him" within the meaning of 18 U.S.C. 3500(e)(1).

While the denial of production of these reports was error, we do not believe that this error calls for reversal of the convictions.

A. AGENT MINTON

On the record, we believe the refusal of this agent's report was harmless. The witness's testimony was not of critical significance since, with respect to the counts upon which petitioners were convicted, it was merely corroborative of other evidence.

B. AGENTS BUESCHER AND MOCHEL

These agents testified to statements made by petitioners and Prindable, concerning which the agents also reported in jointly signed memoranda. While the record does not show the fact, we have been advised by the United States Attorney that verbatim carbon copies of the agents' memoranda, signed by both agents, were delivered to the defense during the cross-examination of Mochel, the second of the two agents to testify, in addition to handwritten notes of the witness, which the court had ordered produced. If such was the fact, the error of the trial court in refusing to order the production of the memoranda was, we submit, for the reasons stated below, harmless. However, since the pertinent facts are not shown by the record as it

stands, we suggest that, unless petitioners agree with this version of the facts, the matter should be remanded for determination by the trial court whether in fact the defense did receive such verbatim copies of the agents' memoranda.

1. If the defense did receive verbatim carbon copies of the agents' memoranda, the error was clearly harmless as to Mochel, the witness then on the stand. *Rosenberg* v. *United States*, 360 U.S. 367, 369–370 (majority opinion), 377, footnote (dissent).

2. Nor is the situation essentially different as regards Buescher. That witness, it is true, had testified and been dismissed when (according to our information) the defense received the verbatim copies of his and Mochel's memoranda. In order for the defense to have cross-examined Buescher on the basis of the documents, it would, consequently, have been necessary to recall him. There is no indication, however, that the court would have denied such a request for recall had one been made; if anything, the record suggests that such a request would have been granted. And since the copies of the memoranda which the defense received bore the signatures of both agents, it was apparent from the face of the documents themselves that they were as germane for cross-examination purposes to Buescher as to Mochel. In those circumstances, the error as to Buescher was cured and rendered harmless.

3. The agents also prepared two other reports of statements made by petitioner Clancy during his interview with them. However, since these statements did not relate to the subject matter of the agents' tes-

timony (statements made by Clancy with respect to the wagering tax liability of the partnership), the defense was not entitled to receive them.

ARGUMENT

I

THE SEARCH AND SEIZURE WERE VALID AND THE SEIZED PROPERTY WAS PROPERLY ADMITTED INTO EVIDENCE

The search and seizure in this case were made pursuant to a search warrant issued by a United States district judge. We may put aside, therefore, all questions with respect to the scope of a search that is made without a warrant, as an incident of a lawful arrest. The issues in this case are much narrower. The questions are (1) whether there was probable cause for the issuance of the search warrant; (2) whether the property was properly seized because it constituted the means and instrumentalities of committing the offense which there was reason to believe was being committed on the premises; and (3) whether such property was properly received in evidence against petitioners in their trial for offenses other than those referred to in the search warrant. We shall show that each of these questions must be answered affirmatively.

A. THERE WAS PROBABLE CAUSE FOR THE ISSUANCE OF THE SEARCH WARRANT

The search warrant stated that there was probable cause to believe that specified property, "used in the conduct and carrying on" of a "wagering business" on the second floor premises at 2300A State Street, in violation of the Internal Revenue Code, was "being

concealed" on such premises (R. 20–21). This finding of "probable cause" was fully justified by the affidavits that were submitted to the district judge in support of the application for the search warrant.

1. 26 U.S.C. 4411 (Appendix A, *infra*, p. 56) imposes a special annual tax of $50.00 upon "[e]ach person who is engaged in the business of accepting wagers" (26 U.S.C. 4401(c) (Appendix A, *infra*, p. 56)) or who "is engaged in receiving wagers" on behalf of any such person. 26 U.S.C. 4412(a)(2) (Appendix A, *infra*, pp. 56–57) makes it the duty of each person required to pay the $50.00 special tax to register with the Internal Revenue Service

> * * * *each* place of business where the activity which makes him so liable [to pay the tax] is carried on * * * [emphasis added].

The pertinent regulations (26 C.F.R. (Supp. as of January 1, 1957) § 325.50(c) (Appendix A, *infra*, p. 59)) similarly provided:

> Each person engaged in the business of accepting wagers on his own account shall report on Form 11–C the name and address of *each place where such business will be conducted* * * *. [Emphasis added.]

The regulations also required that a supplemental registration Form 11–C be filed whenever there was a change in the address of any place where the wagering business was carried on (26 *id.* §§ 325.50(c), 325.57 (Appendix A, *infra*, pp. 59, 60–61)) and that the taxpayer's registered name and his "business or office address * * * if he has one" be distinctly written

or printed by the Collector on the tax stamp before it was delivered or mailed to the taxpayer (26 *id.* § 325.52(b) (Appendix A, *infra,* pp. 59–60)). And under 26 U.S.C. 6806(c) (Appendix A, *infra,* p. 57) each person liable for the special occupational tax is required to "place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person * * *" (see also 26 C.F.R. (Supp. as of January 1, 1957) § 325.53 (Appendix A, *infra,* p. 60)).

26 U.S.C. 7203 (Appendix A, *infra,* p. 58) makes criminal the willful failure of any person "required by this title or by regulations made under authority thereof to make a return * * * or supply any information * * *."

In sum, under the statutes and regulations, registration was required for "each" place where the business of accepting wagers was carried on. However, if the taxpayer had no "principal place of business," he could keep the tax stamp (reflecting the fact of registration) on his person.

2. In the instant case, the affidavits of the Internal Revenue Service agents, on the basis of which the search warrant was issued, clearly justified the inference that 2300A State Street was a fixed place of business—if not the actual headquarters—of a day-to-day bookmaking operation which had been going on for at least several weeks and in all likelihood for a much longer period (see the Statement, *supra,*

pp. 6–9).[12] The affidavit of the Chief of the Collections Division of the local Internal Revenue Service Office stated that there was no record in that office "for said fiscal year [ending June 30, 1957] of a return having been filed by the operator of the place of business carried on in part in the premises known as 2300A State Street, East St. Louis, Illinois, covering John L[e]ppy, Henry D. Zittel or any other person engaged in the business of accepting wagers or engaged in receiving wagers for or on behalf of any other person in said premises or any part of said premises" (R. 12–13; see *supra*, p. 9).

On the basis of this information, the district judge plainly had probable cause to believe (1) that a wagering business was being conducted at 2300A State Street (*supra*, pp. 7–9), and (2) that whoever was conducting the business was doing so in violation of federal law because the records of the Internal Revenue Service failed to reflect that these premises had been registered (*supra*, p. 9). No more was

[12] According to the affidavits, observations tending to indicate that a bookmaking operation was being conducted at 2300A State Street were made on the following dates: March 20, 1957 (R. 8), another day in March 1957 (not specifically identified) (R. 7), April 12, 1957 (R. 14), April 24, 1957 (R. 7), April 29, 1957 (R. 7–8), and May 1, 1957 (R. 14–15, 16, 17–18). In addition, the fact that during the period from August 1956 to January 1957 twenty one telephone calls were known to have been made from a tavern in Collinsville, Illinois, where known bookmakers picked up horse race bets and received telephone bets, to a telephone located in the premises at 2300A State Street (R. 16, 18; *supra*, pp. 8–9) justified the inference that the bookmaking activities had in fact been going on at the State Street address for a much longer period.

necessary to the validity of the warrant authorizing the search of the premises and the seizure of the things used in committing the offense. *Jones* v. *United States*, 362 U.S. 257, 267–272; *Dumbra* v. *United States*, 268 U.S. 435, 441; cf. *Brinegar* v. *United States*, 338 U.S. 160, 175–176.

3. The fact that the North Sales Company, in which petitioners and Prindable were partners, had paid, for the fiscal year ending June 30, 1957, the special $50.00 per annum occupational tax levied on persons engaged in the business of accepting wagers, and had been issued a wagering tax stamp evidencing such payment, has no relevance to the validity of the search warrant. The warrant was not directed to *petitioners'*, or the *North Sales Company's*, books and records. It was directed to specified property, located at a designated address with unknown occupants, which, there was reason to believe, was being used to operate an unregistered wagering business in violation of federal law. As observed by the court below (R. 225):

> It appears from the argument made by the defendants that they would have this court consider only their status as licensed gamblers, and disregard the knowledge the agents had in respect to the activities taking place at the State Street address. They assume the warrant was issued for the express purpose of seizing their books and records, for they argue that since they had registered, received a wagering stamp, and paid some wagering taxes, there was no probable cause for seizure of their books. But, as pointed out by the Government,

> what defendants overlook by such argument is the fact that the warrant was not issued for the purpose of seizing *their* books. The warrant was directed to certain premises and ordered the seizure of property described therein. It did not order the seizure of defendants' property because it was not known at the time who was operating the wagering business at the address stated in the warrant. From the agents' observations there was probable cause to believe that a wagering activity was being operated in violation of the laws of the United States, especially since the premises had not been reported to the District Director as required by 26 U.S.C. § 4412 [Appendix A, *infra*, p. 56–57]. * * * [Emphasis in the original.]

It is no answer to say, as petitioners urge (Br. 5, 22–23, 28), that the North Sales Company, to the knowledge of the Internal Revenue Service, operated "at large" and that the searched premises were merely "one of the places at which [they] were conducting their wagering business that day." For it was apparent to the agents from their observations (see *supra*, pp. 6–9, 30–31, including fn. 12) that 2300A State Street was a fixed or permanent headquarters of an active bookmaking operation. As such, under the statute requiring that "each place of business" where the business of accepting wagers is carried on be registered, it was required to be registered. And it was clear from the agents' examination of the registration records that these premises had not been registered.

B. THE PROPERTY WAS PROPERLY SEIZED BECAUSE IT CONSTITUTED THE INSTRUMENTALITIES OF COMMITTING THE OFFENSES UPON WHICH THE SEARCH WARRANT WAS BASED

The search warrant stated that there was probable cause to believe that the described property was being used on the searched premises for conducting "divers criminal offenses against the laws of the United States," namely, the laws forbidding the carrying on of a wagering business without registering and paying the special $50.00 annual occupational tax and receiving a proper federal tax stamp evidencing such payment (R. 20–21).[13] Obviously, a necessary element of these offenses was that a wagering business was being conducted on the premises. The warrant was directed to, and authorized the seizure of, the paraphernalia used in the conduct of such business. Under settled principles, it was proper to seize the

[13] Petitioners argue that "the crime committed by a person who engages in the wagering business without registering and paying the tax is his failure to register and to pay the tax, and not his engaging in the business without first having paid it" (Br. 33); that, consequently, "[t]he violations alleged in the search warrant [were] crimes of omission and not of commission" (Br. 33–34); and that "[i]t is difficult to understand how any property may be used as a means of committing a crime of omission" (Br. 34). The short answer to this semantic contention is that the "omission"—the failure to pay the special tax and to register—is a crime only if the taxpayer is carrying on the business of accepting wagers. In other words, the crime is the conduct of such a wagering business without having registered and paid the tax. And, as shown in the text, the seized property constituted the instrumentalities used in thus conducting the wagering business at 2300A State Street in violation of federal law. See, also, 26 U.S.C. 7262 (Appendix A, *infra*, p. 58), which makes it an offense for any person to do any act which makes him liable for the special $50.00 tax without having paid it.

tools or instrumentalities used in committing the crime—that is, the paraphernalia used in conducting a gambling operation in violation of federal law.

1. It has long been recognized that the instrumentalities of a crime—the means by which a crime is being or has been committed—are properly subject to seizure under a search warrant or as an incident to a valid arrest. "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime." *Harris* v. *United States,* 331 U.S. 145, 154; see, also, *Abel* v. *United States,* 362 U.S. 217, 238; *United States* v. *Lefkowitz,* 285 U.S. 452, 465–466; *Marron* v. *United States,* 275 U.S. 192, 199; *Agnello* v. *United States,* 269 U.S. 20, 30; *Carroll* v. *United States,* 267 U.S. 132, 149–150; *Gouled* v. *United States,* 255 U.S. 298, 309; *Boyd* v. *United States,* 116 U.S. 616, 623–624. See, also, Rule 41(b)(2) of the Federal Rules of Criminal Procedure, which specifically authorizes the issuance of a search warrant for the seizure of property "[d]esigned or intended for use or which is or has been used as the means of committing a criminal offense." Moreover, the items that may be seized include not only those directly "used to carry on the criminal enterprise,"

but also those that are "so closely related to the business, [that] it is not unreasonable to consider them as used to carry it on" (*Marron* v. *United States, supra*).

The fact that the instrumentalities or means may be documentary in character is, as the Court has held, immaterial. "There is no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure, if only they fall within the scope of the principles of the cases in which other property may be seized, and if they be adequately described in the affidavit and warrant." *Gouled* v. *United States, supra,* 255 U.S. at 309. See, also, *Harris* v. *United States, supra,* 331 U.S. at 148, 153 (canceled checks believed to have been used as means of effecting a forgery); *Marron* v. *United States, supra,* 275 U.S. at 198–199 (utility bills and a ledger showing liquor inventories held properly seized as instrumentalities of offense of maintaining liquor nuisance).

Here, the items seized—scratch sheets, racing forms, turf programs, deposit tickets, a checkbook, telephone bills, packaged currency, rolls of coins, and miscellaneous notes, records, notebooks, pads, etc. (R. 22–23)—were the usual paraphernalia of a horse race bookmaking business. They constituted the precise property that the warrant authorized to be seized: "divers records, to wit, books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business," "receptacles in the nature of envelopes in which there is kept

money won by patrons who have won wagers or bets made at said place of business," and "divers other tools, instruments, apparatus, United States currency and records" used and intended for use in such business (R. 20–21). Since this gambling business was reasonably believed to be operating in violation of federal law, the property used in conducting the business was subject to seizure as the instrumentalities used in committing a federal offense.[14] Cf. *McDonald* v. *United States*, 335 U.S. 451, 453, 455 (numbers slips, money, adding machines; seizure held invalid on other grounds); *Merritt* v. *United States*, 249 F. 2d 19, 21 (C.A. 6) (lottery tickets, numbers tickets, numbers books); *Clay* v. *United States*, 246 F. 2d 298, 304 (C.A. 5), certiorari denied, 355 U.S. 863 ("books, records, papers, documents and memorandum relating to the business of accepting wagers * * *"); *United States* v. *Joseph*, 174 F. Supp. 539, 541, 544–545 (E.D. Pa.) (betting slips, "run down sheets," money, records, and other numbers game paraphernalia).[15]

2. Petitioners, pointing out that petitioner Kastner told one of the agents making the search that North

[14] We do not here rely, as a ground for upholding the search and seizure, upon the ruling of the court of appeals (R. 229–230) that since petitioners were required by statute and Treasury Regulations "to keep books and records reflecting transactions carried on in the course of a taxable wagering activity", the records here seized "were not such *private* papers as to be clothed with immunity from seizure and use against the defendants under the Fourth and Fifth Amendments" (R. 229, emphasis in original). Cf. *Shapiro* v. *United States*, 335 U.S. 1, 17–19, 32–35.

[15] See, also, *Landau* v. *United States Attorney for the Southern District of New York*, 82 F. 2d 285, 287 (C.A. 2), certiorari denied, 298 U.S. 665 (memorandum describing merchandise in-

Sales Company had a tax stamp (Br. 23), contend (Br. 26, 33, 38) that "the crimes alleged in the search warrant had not, in fact, been committed"; and that the seizure was therefore invalid because the seized property was not the instrumentalities of crime but the private papers of petitioners that were being taken solely for use as evidence of other offenses. However, neither the fact that the North Sales Company had a stamp nor the further fact that petitioners were not indicted for the crimes referred to in the search warrant (conducting a wagering business without having registered or paid the $50.00 tax) supports petitioners' contention that the latter offenses were not being committed at 2300A State Street.

Both the statutes and the regulations require that "each" place of business at which the business of accepting wagers is conducted be registered. While a taxpayer who has no "principal place of business" obviously cannot meet this requirement, North Sales Company was not in this category. For it plainly had a place of business at 2300A State Street.

Moreover, North Sales Company's application for registry for the fiscal year ending June 30, 1957, gave its business address as "2401 Ridge Ave—E. St. Louis, Ill." Similarly, the special tax stamp issued to the firm for that fiscal year gave the same address.

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tended to be smuggled); *Foley* v. *United States*, 64 F. 2d 1, 4 (C.A. 5), certiorari denied, 289 U.S. 762 (liquor invoices, price lists, ledgers of customers' accounts, books of unfilled orders, etc.); *United States* v. *Kraus*, 270 Fed. 578, 582–583 (S.D. N.Y.) (inaccurately kept records of liquor sales and purchases legally required to be kept).

See *supra*, pp. 12, 14. The fact that the words "at large" appeared before the Ridge Avenue address on the registration application does not establish that the partnership was operating solely "at large". Indeed, both the regulations and the testimony of an Internal Revenue agent (R. 86) establish that a taxpayer having a place at which he conducts a wagering business cannot also operate "at large". In other words, since North Sales Company gave a place of business in its registration application, it was violating the law by operating another place of business without reporting that fact. It is beside the point that the business address given by the firm in its registration application, and shown in the tax stamp issued to it, may also have been the residential address of one of the partners. The same place may be both a business and a personal address.

C. THE SEIZED PROPERTY WAS PROPERLY ADMITTED IN EVIDENCE AGAINST PETITIONERS

As we have shown, the books and records here involved were properly seized by the government, under a valid search warrant, as instrumentalities used in the commission of crime. Once it be established that the original seizure of the property was valid, its subsequent retention by the government and its use against petitioners as evidence was also valid, even though the crimes which the seized property was used to prove at the trial were not the same crimes upon which the search warrant was based. *Gouled* v. *United States*, 255 U.S. 298; *Abel* v. *United States*, 362 U.S. 217.

In *Gouled*, papers were seized from the defendant's office under a search warrant which stated that there was probable cause to believe that they were used to commit the offenses of bribing an officer of the United States and conspiring to defraud the United States. Gouled was convicted of conspiring to defraud the United States and using the mails to promote a scheme to defraud the United States. The papers were received in evidence against him. This Court upheld such use of the seized papers.

In its opinion, the Court answered six certified questions. One of the questions was (p. 311):

> If in the affidavit for search warrant under Act of June 15, 1917, the party whose premises are to be searched be charged with one crime and property be taken under the warrant issued thereon,—can such property so seized be introduced in evidence against said party when on trial for a different offence?

The Court answered the question "Yes" (p. 313), stating as follows (pp. 311–312, emphasis added):

> It has never been required that a criminal prosecution should be pending against a person in order to justify search for and seizure of his property under a proper warrant, if a case of crime having been committed and of probable cause is made out sufficient to satisfy the law and the officer having authority to issue it, and ***we see no reason why property seized under a valid search warrant, when thus lawfully obtained by the Government, may not be used in***

> *the prosecution of a suspected person for a crime other than that which may have been described in the affidavit as having been committed by him.* The question assumes that the property seized was obtained on a search warrant sufficient in form to satisfy the law, and if the papers to which the question refers had been of a character to be thus obtained, lawfully, it would have been competent to use them to prove any crime against the accused as to which they constituted relevant evidence.

Similarly, in *Abel* v. *United States*, 362 U.S. 217, the Court recently upheld the Government's use, as evidence in a prosecution for conspiracy to commit espionage, of property that had been seized in connection with an administrative arrest preliminary to deportation. Noting that the seized objects "may well be considered as instruments or means for accomplishing his illegal status [as an alien], and thus proper objects of search" (p. 237), the Court stated (pp. 239–240):

> Items (1)–(5) having come into the Govment's possession through lawful searches and seizures connected with an arrest pending deportation, was the Government free to use them as evidence in a criminal prosecution to which they related? We hold that it was. Good reason must be shown for prohibiting the Government from using relevant, otherwise admissible, evidence. There is excellent reason for disallowing its use in the case of evidence,

> though relevant, which is seized by the Government in violation of the Fourth Amendment to the Constitution. * * *
>
> These considerations are here absent, since items (1)–(5) were seized as a consequence of wholly lawful conduct. That being so, we can see no rational basis for excluding these relevant items from trial: no wrongdoing police officer would thereby be indirectly condemned, for there were no such wrongdoers; the Fourth Amendment would not thereby be enforced, for no illegal search or seizure was made; the Court would be lending its aid to no lawless government action, for none occurred. * * *[16]

Here, too, no "[g]ood reason" has been "shown for prohibiting the Government from using [this] relevant, otherwise admissible evidence" (*Abel, supra*). It was not "seized by the Government in violation of the Fourth Amendment to the Constitution" (*ibid.*); on the contrary, as we have shown, it was "seized under a valid search warrant [and thus] lawfully obtained by the Government" (*Gouled, supra*). There is "no rational basis for excluding these relevant items from trial" (*Abel*); they may be "use[d] * * * to prove any crime against the accused as to which they constituted relevant evidence" (*Gouled*).

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[16] Indeed, even the dissenting opinion of Mr. Justice Brennan in *Abel* recognized that, "[i]f the search were made on a valid warrant, there would be no such issue [as to the reasonableness of the search] even if it turned up matter relevant to another crime. See *Gouled* v. *United States*, 255 U.S. 298, 311–312" (362 U.S. at 253).

II

THE TRIAL COURT ERRED IN REFUSING TO ORDER THE PRODUCTION OF THE AGENT-WITNESSES' REPORTS. BUT THE RECORD SHOWS THAT, WITH RESPECT TO ONE OF THESE WITNESSES (MINTON), THE ERROR WAS HARMLESS. WITH RESPECT TO THE OTHER TWO WITNESSES (BUESCHER AND MOCHEL), WE HAVE INFORMATION, NOT SHOWN BY THE RECORD, THAT THE DEFENSE RECEIVED VERBATIM CARBON COPIES OF THE REPORTS TO WHICH IT WAS ENTITLED. SINCE IN SUCH CIRCUMSTANCES THE ERROR AS TO THEM WOULD ALSO BE HARMLESS, THE CASE SHOULD BE REMANDED TO DETERMINE THE FACTS AS TO THOSE WITNESSES

Among the Government's witnesses were three Internal Revenue agents: Minton, Buescher and Mochel. Each of these witnesses testified on direct examination with respect to certain statements made by one or both of the petitioners, either to the witness or to another agent. Each witness had subsequently made a written report of the conversation or conversations in which the statements were made. The trial court denied defense motions for production of these reports, on the ground that under the Jencks Act (18 U.S.C. 3500) only contemporaneously written statements made by the agent at the time of the interview, and not subsequent reports, were producible (R. 97, 99, 101–102; Tr. 302).

We agree with petitioners that these rulings were erroneous. The Jencks Act lists two kinds of "statements" relating to "the subject matter as to which the witness has testified" that are producible upon a motion by the defense after the witness has testified on direct examination (18 U.S.C. 3500(e)): "(1) a writ-

ten statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." The trial court apparently believed that the agents' reports were covered by the definition in subsection (2). In fact, however, the definition in subsection (1) was applicable, since production was sought of "a written statement made by said witness and signed * * * by him," namely, his report covering the conversations with petitioners. The Government has recognized before this Court that statements otherwise producible under 18 U.S.C. 3500 are not immunized from production because they happen to be statements of government agent-witnesses. See Brief for the United States, pp. 26–27, *Needelman* v. *United States*, No. 278, Oct. Term, 1959, writ of certiorari dismissed, 362 U.S. 600."

While the denial of production of these reports was error,[18] we do not believe that this error calls for reversal of the convictions. With respect to one witness,

[17] In two decisions subsequent to the instant case, the court below held that reports made by government agent-witnesses to their superiors were producible. *United States* v. *Berry*, 277 F. 2d 826, 829–830 (C.A. 7); *United States* v. *Sheer*, 278 F. 2d 65, 67–68 (C.A. 7).

[18] In upholding the denial of production, the court of appeals ruled that 18 U.S.C. 3500 does not apply where the agent-witness who testifies to statements made to him by an interviewed person was not an "undercover" agent but one whose identity as a government agent was known to the person concerning

agent Minton, we think the record shows that the error was harmless. With respect to the other two witnesses, the record is unclear as to precisely what material was given to the defense. While the court's rulings limited the papers to be delivered to the defense to notes made by the witnesses at the time of the interviews, according to our information the defense was actually given, in addition to such notes, verbatim carbon copies of the agent-witnesses' reports of the interviews. However, since these facts are not shown by the present record, we suggest that, unless petitioners agree with the version of the facts hereinafter set forth (*infra*, pp. 49–51), this Court, without reversing the convictions and remanding for a new trial, should remand this case to the district court to determine whether the papers which were actually delivered to the defense at the trial included verbatim copies of the reports. If, upon such remand, it is found—as we believe to be the case—that petitioners were given such verbatim copies, we submit that the error in the court's order denying production of the reports was harmless. *Rosenberg* v. *United States*, 360 U.S. 367, 369–370 (majority opinion), 377, footnote (dissent).

A. AGENT MINTON

The Internal Revenue agents who executed the search warrant included Kienzler and Minton. Agent Kienzler, who testified first, described a conversation

whose statements he testified (R. 235). There is no basis in either the language of the statute or its legislative history for such a distinction, and subsequently the court below appears to have rejected it. See note 17, *supra*.

he had with petitioner Kastner at the time of the search. According to Kienzler, Kastner told him that he was a partner in the North Sales Company; that he "served as a clerk and worked on a commission of the profits"; that Clancy and Prindable were the other partners; that he (Kastner) had nothing to do with the records of the company; that Clancy took took care of those; that he (Kastner) did not personally have a wagering stamp or occupational tax stamp, but that the partnership did have such a stamp and that Clancy took care of it; that when the officers arrived he (Kastner) was "waiting for one or more phone calls," the nature of which he did not state, though he was asked to do so; that he did not know the agents of the North Sales Company by name; and that he did not know any customers of the company by name. However, Kastner mentioned the initials of a few of the most recent customers, including a "James 'P'" and a "Mrs. 'P'" (*supra*, pp. 15–16).

Defense counsel, as we have pointed out (*supra*, p. 16), made no request for the production of any report, memorandum, or prior statement by Kienzler touching upon the subject matter of his testimony; nor was he asked whether he had made any such report or prior statement or whether he took notes during the interview with Kastner.

Agent Minton testified immediately following Kienzler (R. 96). Minton testified with respect to the conversation between Kienzler and Kastner, which he "over-hear[d]" (Tr. 72), but in which he did not "personally" participate (Tr. 76). He took no notes,

but merely "observed and listened and watched Mr. Kienzler take notes" (Tr. 77). After the interview, Minton returned to his office (Tr. 77), and "prepared a memorandum" that "stated my knowledge of the conversation" (Tr. 83). It was this memorandum which the trial court refused to order produced.

According to Minton, Kastner told agent Kienzler that he was "a junior partner and clerk in a partnership with Tom Clancy and James Prindable"; that he had been a partner about three years and, prior to that time, had been a clerk or agent in their wagering activities most of his life; that he "answered the telephone and took bets"; that he "did not collect any money"; that he did not know any of the agents of the partnership by name; and that he could not name any of the partnership's customers by name, but that he knew the initials of some of them, which he gave (*supra*, pp. 16–17).

We submit that, viewed in the context of the trial and the Government's proof as a whole, the trial court's refusal to direct production of Minton's report was not prejudicial. Minton's testimony was not at all of critical significance since, with respect to the counts upon which petitioners were convicted, it was merely corroborative of a mass of other evidence.

There were two major points in Minton's testimony—(1) that Kastner admitted being a partner in the wagering enterprise, and (2) that he said he did not know any of the partnership's agents by name. The latter testimony related to the false statement charge of count 2 of the indictment (*supra*, p. 3). Since Kastner was acquitted on that count (R. 188),

this aspect of Minton's testimony is no longer of significance. The other portion of his testimony—Kastner's admission to being a partner in the enterprise—was merely cumulative of a great deal of other evidence that fully established that fact.

In the first place, Minton's testimony merely corroborated the testimony of Kienzler, who was the agent to whom the admission was made and who described his conversation with Kastner. And, as noted, petitioners made no request for any prior statements that Kienzler might have made. Kastner's admission that he was a partner was further corroborated by the testimony of agents Hudak (R. 105–106) and Mueller (R. 109). Kastner's partnership status was also established by a mass of documentary evidence, including the partnership's monthly wagering tax returns (G. Exs. 1–10, R. 84), its several applications for registry (G. Exs. 11–14, R. 84–85), the tax stamps issued to it by the Internal Revenue Service (D. Exs. 1 and 2, Tr. 327–328), and the partnership returns filed by it between 1954 and 1956 (G. Exs. 116, 118–119, Tr. 310–312). Most important of all, Kastner's own individual income tax returns from 1953 to 1956 (G. Exs. 25–28, Tr. 21–22) acknowledged that he was a partner in the enterprise and reported as income his earnings from it.

B. AGENTS BUESCHER AND MOCHEL

Agents Buescher and Mochel testified with respect to an interview they had with petitioner Clancy on December 13, 1956, and to an interview with Prindable and petitioner Kastner (jointly) on December 14,

1956—both interviews being several months before the search and seizure. See the Statement, *supra*, pp. 18–21. Buescher took no notes during these interviews, but Mochel did; on the basis of these notes, the agents subsequently prepared reports of the interviews, which both signed. See *supra*, pp. 20, 21. The trial court directed production of Mochel's handwritten notes when the latter was on the stand, but denied a defense request for production of the agents' subsequent reports. See *supra*, pp. 20–21. We agree with petitioners that under 18 U.S.C. 3500 they were entitled to production of the agents' reports. See *supra*, pp. 43–44.

Although the record shows that certain papers were turned over to defense counsel at the trial, it does not indicate precisely what those papers were (see *supra*, pp. 21–23). The United States Attorney, who participated in the trial of the case, has advised us that, in fact, the defense was given not only Mochel's handwritten notes, but verbatim carbon copies of the agents' reports as well. According to our understanding, the facts relating to the notes and reports made by these agent-witnesses of the December 13 and 14 interviews are as follows:

During the December 13 interview with petitioner Clancy, Mochel took longhand notes of statements made to the agents by Clancy. These notes we shall refer to as Mochel's "original" notes. Immediately following the interview, Mochel made a set of "secondary" notes, based on the original notes. The secondary notes were a grammatical and narrative report of

Clancy's statements at the interview, written in longhand.

The same procedure was followed by Mochel on the following day. Mochel made a set of original notes relating to Prindable and a set of original notes relating to petitioner Kastner during the agents' joint interview of those two individuals on December 14, and, immediately after the interview, Mochel made longhand secondary notes (one set with respect to Prindable and another with respect to Kastner), based on his original notes. These secondary notes, like the secondary notes relating to Clancy, were grammatical and narrative reports of what the respective interviewees said during the joint interview.

Following the making of the secondary notes, a separate "memorandum of interview" for each interviewee was typed up from such notes, with a number of carbon copies. These three typed memoranda were verbatim transcripts of the respective secondary notes and were signed by both agents. They constituted the agents' reports which agent Buescher, in his cross-examination, acknowledged signing, and which the trial court refused to make available to the defense.

During Mr. Mochel's cross-examination, carbon copies of all three memoranda, each copy bearing the handwritten signatures of both Mr. Mochel and Mr.

Buescher, were delivered to defense counsel,[19] in addition to the witness's original notes. Thus, the defense actually received, through witness Mochel, verbatim carbon copies, signed by both agents, of the joint memoranda or reports of the agents which had been denied it when Mr. Buescher was on the stand.

We shall now show that, if the facts are as we believe them to be, the trial court's refusal to direct production of the agents' reports was harmless error. However, since these facts are not shown by the record as it now stands, we suggest that, unless petitioners acknowledge that these are the facts, the matter should be remanded for a determination by the trial court whether in fact the defense did receive verbatim copies of the agents' reports.

1. As we have pointed out (*supra*, pp. 50–51), our information is that during the cross-examination of agent Mochel (the second of the two agent witnesses), carbon copies of the agents' three reports, each copy bearing the handwritten signatures of both Mr. Mochel and Mr. Buescher, were delivered to defense counsel (Appendices C, D, and E, *infra*, pp. 65–71). Since the defense thus received verbatim copies, signed by both agents, of the agents' reports, it follows that, at least as to Mochel, the witness then on the stand, the

[19] Copies of the three documents received by counsel appear as Appendices C, D, and E, *infra*, pp. 65–71.

court's error in declining to order the production of the reports was harmless. *Rosenberg* v. *United States*, 360 U.S. 367, 369–370 (majority opinion), 377, footnote (dissent).

2. Nor is the situation essentially different as regards Buescher. That witness, it is true, had testified and been dismissed when the defense received the verbatim copies of his and Mochel's memoranda. In order for the defense to have cross-examined Buescher on the basis of the documents thus received, it would, consequently, have been necessary to recall him for further cross-examination. There is no indication, however, that the court would have denied such a request for recall had one been made; if anything, the record suggests that such a request would have been granted.[20] And since the copies of the agents' memoranda which the defense eventually received bore the handwritten signatures of both agents, it was apparent from the face of the documents themselves that they were materials which were as germane for cross-examination purposes to Buescher as to Mochel. In these circumstances, we submit, the error as to Buescher was similarly cured and rendered harmless.

3. The interviews which Buescher and Mochel had with Clancy, and with Kastner and Prindable, dealt not only with North Sales Company's wagering tax liability, but also with the income of the partnership

[20] Thus, after agent Kienzler had been excused following his testimony, the court stated that "after the witnesses testify, they may remain in the court room." Defense counsel added: "And they can't be recalled." The court responded: "No, I didn't say that" (Tr. 70).

and the income tax liability of the individual partners. The agents' reports of their interviews with Prindable and Kastner covered both subjects. In the case of Clancy, however, the agents prepared three separate reports; one related to the wagering tax liability of North Sales Company, one to the income of the partnership, and one to the personal income tax liability of Claney. Only the first of these three reports on the interview with Clancy was turned over to the defense (Appendix C, *infra*, pp. 65–68). The three reports are set forth in Appendices C, E, and G, *infra*, pp. 65–68, 72–73, 74, respectively.

We submit that petitioners were not entitled to the other two reports (Appendices F and G, *infra*, pp. 72–74). Under 18 U.S.C. 3500, the only report of a witness that the defense is entitled to is one "which relates to the subject matter as to which the witness has testified." The "subject matter" as to which Agents Buescher and Mochel testified was the statements made to them by Clancy with respect to the wagering tax liability of North Sales Company. They did not testify with respect to the income tax liability of Clancy himself, or the income of the partnership.

The agents' report dealing with the personal income tax liability of Clancy (Appendix G, *infra*, p. 74) does not deal with any of the matters covered in the trial testimony of agents Buescher and Mochel. Clearly, therefore, the defense was not entitled to receive this report. The report relating to the income of the partnership does contain two statements that were also made by the agents in their trial testimony: that Clancy stated in the interview (1) that the prin-

cipals in the North Sales Company partnership were himself, Prindable and Donald Kastner, and (2) that the partnership had no telephone (Appendix F, *infra*, pp. 72, 73). The making of the first statement by Clancy was testified to at the trial by both agents Buescher and Mochel (R. 100, 142–143; Tr. 85, 281); the making of the second one was testified to only by agent Buescher (Tr. 86).

However, both of these statements by Clancy were also reported in the report of the interview that was, according to our information, turned over to the defense at the trial (Appendix C, *infra*, pp. 65, 66, 68). Accordingly, any possible error in not turning over to the defense the small portions of the agents' report dealing with the partnership's income that contain these two particular statements was plainly harmless.

CONCLUSION

It is respectfully submitted that this Court should hold (1) that the search and seizure, and the government's subsequent retention of the seized property and its receipt in evidence against petitioners, were valid; and (2) that the error in denying production of agent Minton's report was harmless. It is also respectfully submitted that, unless petitioners agree with the version of the facts we have presented, the Court should vacate (but not reverse) the judgment of the court of appeals, and remand to the district court to determine whether, in the case of agents Buescher and Mochel, the papers that were actually delivered to the defense at the trial included verbatim copies of those agents' reports. We believe that this Court can now de-

termine that, if the facts are as we believe them to be, the erroneous denial of production of the agents' reports was harmless for the reasons we have set forth, but the Court may deem it more appropriate, if it adopts our suggestion for a remand, to leave it to the courts below to determine that question in the first instance.

Respectfully submitted.

J. Lee Rankin,
Solicitor General.
Malcolm Richard Wilkey,
Assistant Attorney General.
Daniel M. Friedman,
Assistant to the Solicitor General.
Robert S. Erdahl,
Philip R. Monahan,
Attorneys.

November 1960.

APPENDIX A

I. The relevant sections of the Internal Revenue Code (U.S.C., Title 26) provide in pertinent part as follows:

CHAPTER 35.—TAXES ON WAGERING

Subchapter A.—*Tax on Wagers*

§ 4401. *Imposition of tax.*

(a) *Wagers.*

There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof.

* * * * *

(c) *Persons liable for tax.*

Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. * * *

* * * * *

Subchapter B.—*Occupational Tax*

§ 4411. *Imposition of tax.*

There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any other person so liable.

§ 4412. *Registration.*

(a) *Requirement.*

Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

(1) his name and place of residence;

(2) if he is liable for tax under subchapter A, each place of business where the activity

which makes him so liable is carried on, and the name and place of residence of each person who is engaged in receiving wagers for him or on his behalf; and

(3) if he is engaged in receiving wagers for or on behalf of any person liable for tax under subchapter A, the name and place of residence of each such person.

(b) *Firm or company.*

Where subsection (a) requires the name and place of residence of a firm or company to be registered, the names and places of residence of the several persons constituting the firm or company shall be registered.

* * * * *

CHAPTER 69.—GENERAL PROVISIONS RELATING TO STAMPS

* * * * *

§ 6806. *Posting occupational tax stamps.*

* * * * *

(c) *Occupational wagering tax.*

Every person liable for special tax under section 4411 shall place and keep conspicuously in his principal place of business the stamp denoting the payment of such special tax; except that if he has no such place of business, he shall keep such stamp on his person, and exhibit it, upon request, to any officer or employee of the Treasury Department.

* * * * *

CHAPTER 75.—CRIMES, OTHER OFFENSES, AND FORFEITURES

Subchapter A.—*Crimes*

PART I—GENERAL PROVISIONS

§ 7201. *Attempt to evade or defeat tax.*

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty

of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

* * * * *

§ 7203. *Willful failure to file return, supply information, or pay tax.*

Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return [with exceptions not here pertinent], keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution.

* * * * *

Subchapter B.—*Other Offenses*

* * * * *

§ 7262. *Violation of occupational tax laws relating to wagering—failure to pay special tax.*

Any person who does any act which makes him liable for special tax under subchapter B of chapter 35 without having paid such tax, shall, besides being liable to the payment of the tax, be fined not less than $1,000 and not more than $5,000.

* * * * *

II. The relevant sections of the internal revenue regulations (26 C.F.R. (Supp. as of January 1, 1957)) provided in pertinent part during the period here involved (March-May, 1957):

§ 325.50 *Registry, return, and payment of tax.* (a) No person shall engage in the business of accepting wagers subject to the 10 percent excise tax * * * until he has filed a return on Form 11–C and paid the special tax * * * * * *

(b) Each return shall show the taxpayer's full name. A person doing business under an alias, style, or trade name shall give his true name, followed by his alias, style, or trade name. In the case of a partnership, association, firm, or company, other than a corporation, the style or trade name shall be given, also the true name of each member and his place of residence. * * *

(c) Each person engaged in the business of accepting wagers on his own account shall report on Form 11–C the name and address of each place where such business will be conducted and the name, address, and number appearing on the special (occupational) stamp of each agent or employee who may accept wagers on his behalf. Thereafter, a return shall be filed on Form 11–C, marked "supplemental," each time an additional employee or agent is engaged to receive wagers. Such supplemental return shall be filed not later than 10 days after the date such agent or employee is engaged to receive wagers * * *. As to a change of address, see § 325.57.

* * * * *

§ 325.52. *Tax payment evidenced by special tax stamp.* (a) Upon receipt of a return, on Form 11–C, together with remittance of the full amount of tax due, the collector will issue a special tax stamp as evidence of payment of the special tax. * * *

(b) Collectors will distinctly write or print on the stamp before it is delivered or mailed to the taxpayer the following information: (1) The taxpayer's registered name, and (2) the

business or office address of the taxpayer if he has one; if not, the residence address. * * *

* * * * *

§ 325.53 *Special tax stamp to be posted.* The special tax stamp issued to a taxpayer as evidence of the payment of the tax shall be kept posted conspicuously in his principal place of business, except that if he has no such place of business he shall keep such stamp on his person and exhibit it, upon request, to any officer or employee of the Bureau of Internal Revenue. Any person who, through negligence, fails to post the special tax stamp in his principal place of business, or who fails to keep the special tax stamp on his person in the event he has no business address, shall be liable to a penalty of $50 and the cost of prosecution. * * *

* * * * *

§ 325.57 *Change of address*—(a) *Procedure by taxpayer.* Whenever a taxpayer changes his business or residence address to a location other than that specified in his last special tax return (see § 325.50), he shall, within 30 days after the date of such change, register the change with the collector from whom the special tax stamp was purchased, by filing a new return, Form 11–C, designated "Supplemental Return," and setting forth the new address and the date of change. The taxpayer's special tax stamp shall accompany the supplemental return for proper notation by the collector. * * *

(b) *Procedure by collector; removal within district.* When registration is made by a taxpayer in the manner specified in paragraph (a) of this section, of a change of address within the same district, the collector, if necessary, will enter on his Record 10 (see § 325.61) the new address and the date of change. If the information disclosed on the supplemental return is such as to require a change on the face of the special tax stamp, the collector will make

the proper change and return the stamp to the taxpayer for posting.

(c) *Procedure by collector; removal to another district.* In case of removal of the taxpayer's office or principal place of business (or residence address, if he has no office or principal place of business) to another collection district, the collector will note the transfer on his Record 10, stating the change of location, and shall then transmit the special tax stamp to the collector for the district to which such business or office was removed. The latter will make an entry on his Record 10, as in the case of an original registration in his district, correct the address on the stamp, if necessary, and note also thereon his name, title, date, and district, and then forward the stamp to the taxpayer.

* * * * * *

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APPENDIX B

May 6, 1957

[To] Frank Hudak, Group Supervisor E. St. Louis, Illinois

[From] Ira L. Minton, IRA E. St. Louis, Illinois

Memorandum of activities and observations during service of search warrant for p[re]mises located at 2300a State St. on May 6, 1957.

I arrived at the location at 10:58 A.M. and took the licenses numbers of the following vehicles parked in the area.

[List of license numbers follows; deleted as irrelevant to witness's testimony.]

Upon entry of the other offigers I guarded the southeast corner of the building to prohibit any persons from leaving the premises until all exits were secured from the inside. At 11:05 A.M. I joined S. A. George W. Kienzler upstairs, who was beginning to question Donald Lee Kastner.

Mr. Kastner stated he was a clerk and junior partner in a partnership with James Prindable and Tom Clancy. Mr. Kastner stated they handled all bets regardless of size and made no layoffs. He stated he had been in the partnership about three years, but had been in the horse book business all his life mostly as a clerk or agent for other people. Mr. Kastner said that he could not name any agent as he didn't know any by name. In answer to inquiry Mr. Kastner said that they did not have a stamp for the location as they didn't always do business at the same location. He said Tom has been taking care of the Federal Wagering Stamp and he hasn't discussed it with Tom.

In response to an inquiry regarding who collected the money, Mr. Kastner replied that his partners and his brother Charles Kastner were the only ones to his knowledge. Mr. Kastner stated that he was given his share of the partnership by Mr. Prindable. He added that he was paid a per cent of the profits but that he doesn't know the percentage. He said he averaged $100.00 per week. Mr. Kastner stated that he made no payouts for the partnership, kept no books on the operations, and made no inspection of the records at any time. When asked about racing service Mr. Kastner said they did not have it all the time but when they had it, it was obtained on a subscription basis from Gordon Foster. Tom takes care of it.

Mr. Kastner said his purpose on the premises was to answer the phone and to take bets. Upon request Mr. Kastner empfied his pockets. He had $70.00 cash and other miscellaneous items of no conseq. ence. He had no records or other betting evidence on his person. In answer to questioning he listed Jim P., Mrs. P., I. W. and V. H. as regular customers but said he didn't know their names. Mr. Kastner said that he got his scratch sheets from Charles Kastner that morning. He stated that Press Waller was their accountant and that he keep [*sic*] the partnership records.

The following data was transcribed from the wall paper beside the phone.

> [List of telephone numbers and other notations follows; deleted as irrelevant to witness's testimony.]

After the interview I searched part of the central room in which the phone and records were located. Items listed in the inventory as #'s 1, 2, 3, 4, 12, 13, and 14 were found and immediately surrendered to S. A. Kienzler, who tagged and labeled all items. I

verified cash, inventory of items seized, and I was present when S. A. Kienzler took a statement near the close of the interview from Mr. Donald Kastner which he stated was true but did not wish to sign before consulting his lawyer. Mr. Kastner verified all cash seized and was offered an opportunity to examined [*sic*] all records seized. Departed the premises about 1:50 P.M.

/s/ IRA L. MINTON

APPENDIX C

12-13-56

MEMORANDUM OF INTERVIEW

North Sales Co.

M. O. Mochel and W. L. Buescher Examining Officers

Thomas D. Clancy, Partner

Examination took place in office of Press Waller, Accountant, Murphy Bldg., E. St. Louis, Illinois. Mr. Waller, his partner, Mr. Wm. Keeley, and Mr. Clancy present.

Type of Operation

Mr. Clancy stated that the partnership operates a horsebook. Mr. Clancy was definite in answering that the partnership has not operated any other type gambling pool, specifically football, baseball.

Address

Mr. Clancy stated that the address, 2401 Ridge Ave., E. St. Louis, Ill., used on the wagering tax returns, Forms 730, is Mr. Clancy's personal residence. Mr. Clancy stated that the partnership has no principal place of business. Mr. Clancy stated that the three partners, Clancy, Prindable, and D. Kastner, pick up bets by going from place to place, where they meet their customers.

Principals

Mr. Clancy stated that the three partners, Thomas D. Clancy, James A. Prindable, and Donald Kastner, are the principals involved in accepting wagers in the name of the partnership, North Sales Company.

Agents

Mr. Clancy stated that the partnership had one employee during the period January 1, 1955, through June 30, 1956, Mr. Charles Kastner, a brother of Donald Kastner.

Mr. Clancy stated that the partnership had added another employee, Malcolm Wagstaff, during July, 1956, and presently has the two employees, Charles Kastner and Malcolm Wagstaff.

Mr. Clancy stated that the partnership has not had, and does not have any other employees.

Mr. Clancy stated that Charles Kastner and Malcolm Wagstaff accept wagers for the partnership, North Sales Company.

Manner of Receiving Bets

Mr. Clancy stated that the three principals, Clancy, Prindable, and Donald Kastner, and the two agents, Charles Kastner and Wagstaff, accept the wagers from the actual bettors. The agents accepted wagers during their terms of employment only.

Mr. Clancy stated that the three principals, Clancy, Prindable, and Donald Kastner, might occasionally accept a wager over the telephone. Mr. Clancy stated that this practice was very seldom used, but that once in a great while, a good customer or personal friend, might locate one of the principals by telephone and the principal might accept the wager. Mr. Clancy stated this situation to be very rare as none of the principals had a particular location where they might be reached.

Mr. Clancy stated he was not too familiar with the manner in which the agents, Charles Kastner and Wagstaff, accepted their wagers, as these agents are required to turn in cash for each wager accepted, and if the agents did receive wagers by telephone, then the agent is responsible for the cash involved.

Mr. Clancy stated that the principals and agents have their own bettors which they contact. Mr. Clancy stated that bettors are visited by the principals and agents to secure wagers. Mr. Clancy stated that the principals and agents make approximately the same stops and/or locations each day and therefore, the bettors have a general idea of where the principals and agents may be found in order that the bettors may place wagers.

Mr. Clancy stated that once in awhile the principals might accept wagers on credit. Mr. Clancy stated that this was very seldom as the partnership could not operate on credit. Mr. Clancy stated that a bettor was shut off if his tab reached $20.00 or $30.00.

Mr. Clancy stated that the limit on accepting bets was determined by the price of the horse, in other words a $30. bet might be accepted on a short odds horse, while a $10. bet might be refused on a long odds horse.

Manner of Paying Winners

Mr. Clancy stated that all winners were paid off by one of the three principals and the agents never pay off any winners. Mr. Clancy stated that each winner is paid off in person on the day following the placing of the wager. Mr. Clancy stated that the winners are never hard to find and that this also gives the principals a chance to accept another wager.

Race Information

Mr. Clancy stated that the partnership pays a fee of $75.00 per week to Gordon Foster at a Distributing Company in St. Louis, Missouri. Mr. Clancy stated he was not sure of the name of the Distributing Company, but knew it was Gordon Foster.

Mr. Clancy stated that he uses a public telephone, whichever one might be handy, to call the Distributing Company and obtain the race information. Mr. Clancy stated the partnership does not have a telephone of their own.

Layoffs

Mr. Clancy stated very definitely that the partnership does not lay off any bets with other horsebooks, etc. Mr. Clancy stated very definitely that the partnership does not accept any layoff bets from any other horsebook, etc.

Records

Mr. Clancy stated that he accumulates the bet tickets from the principals and agents, marks the winning tickets with the amount won, runs an adding machine tape of the amount of wagers accepted and the amount of winners paid out, determines the amount of net profit and/or loss for the day, and then turns the bet tickets with the tape over to Mr. Press Waller, accountant.

Mr. Clancy stated that he also gave Mr. Waller the receipted bills from Pohlman News Co., for the racing forms and scratch sheets, and the Post Office Money Order receipts from payment, for race information, to Gordon Foster and/or his Distributing Company.

Mr. Clancy stated that he, personally, handled these items for the partnership. Mr. Clancy stated that the only manner in which he could identify the principal and/or agent receiving the individual wagers was through the handwriting appearing on each bet ticket. Mr. Clancy stated that a few of the bet tickets might also be in the handwriting of the person making the bet.

/s/ MARTIN O. MOCHEL
/s/ W. BUESCHER

APPENDIX D

12-14-56

MEMORANDUM OF INTERVIEW

James A. Prindable

M. O. Mochel and W. L. Buescher, Examining Officers.

Examination took place in office of Press Waller, Accountant, Murphy Bldg., E. St. Louis, Illinois. Mr. Waller, Mr. Prindable, and Mr. Donald Kastner were present.

Mr. Prindable stated he is married and very recently had a daughter born to he and Mrs. Prindable. Mr. Prindable stated he has no income of any kind except his share from North Sales Company.

Mr. Prindable stated he has no checking account, no savings account, no stocks, no bonds, domestic or U.S. Government, no postal savings, no savings and loan, and no other accounts of any kind.

Mr. Prindable stated he covers more or less a regular route in securing wagers. Mr. Prindable stated he uses his auto in the business of securing wagers daily.

Mr. Prindable stated he takes the payoffs to his winners.

Mr. Prindable stated that he refuses any bets considered too large according to the odds on the horse. Mr. Prindable stated he actually refuses to accept bets considered too large and stated he did not recommend the bettor to any other horsebook. Mr. Prindable stated he did not *know* of any other horsebook.

Mr. Prindable stated that his auto expense incurred for the partnership was so small that he took care of it personally. Mr. Prindable stated he incurred no other expenses for the partnership such as telephone, etc.

/s/ MARTIN O. MOCHEL
/s/ W. BUESCHER

APPENDIX E

12-14-56

MEMORANDUM OF INTERVIEW

Donald Kastner

M. O. Mochel and W. L. Buescher Examining Officers.

Examining took place in office of Press Waller, Accountant, Murphy Bldg., E. St. Louis, Illinois. Mr. Waller, Mr. Prindable, and Mr. Donald Kastner were present.

Mr. Kastner stated he is married and that he and/or his wife had no income during 1955 and so far in 1956, except from North Sales Co.

Mr. Kastner stated that his wife has a checking account in, either the Union National Bank of E. St. Louis, or the First National Bank of E. St. Louis. Mr. Kastner stated he was not positive which of these banks the account was in, but one or the other.

Mr. Kastner stated he has no bank account, checking or savings, no stocks or bonds of any kind, no postal savings, and no savings and loan.

Mr. Kastner stated that he used his car only to come to town and secured his wagers by walking.

Mr. Kastner stated that he pays off his own winners.

/s/ MARTIN O. MOCHEL
/s/ W. BUESCHER

APPENDIX F

12–13–56

MEMORANDUM OF INTERVIEW

North Sales Co.

M. O. Mochel and W. L. Buescher Examining Officers

Thomas D. Clancy, Partner

Examination took place in office of Press Waller, Accountant, Murphy Bldg., E. St. Louis, Illinois. Mr. Waller, his partner, Mr. Keeley, and Mr. Clancy present.

Receipts

Totalled by Waller from bet tickets furnished by Mr. Clancy as per wagering report.

Payoffs

Totalled by Waller from bet tickets furnished by Mr. Clancy as per wagering report.

Expenses

The amount of wagering tax is computed from the records kept by Waller who also prepares the wagering tax return for Mr. Clancy's signature.

Mr. Clancy stated the partnership purchases one wagering stamp to cover the three principals, Clancy, Prindable, and Donald Kastner. Mr. Clancy stated that the partnership has always paid for the wagering tax stamp for the employees, Charles Kastner and Wagstaff.

Mr. Clancy stated that he kept a weekly record of wages paid by the partnership and reported the totals

to Mr. Waller each quarter in order that the employment tax returns might be prepared.

Mr. Waller computed the employer's share of the F.I.C.A. tax as 2% of the wages reported for F.I.C.A.

Mr. Clancy stated that the amount deducted as telephone expense was actually expended for race information which was secured over the telephone, Mr. Clancy stated that the partnership had no telephone.

Mr. Clancy stated that the amount deducted for forms was the expense incurred for form sheets and scratch sheets to Pohlman News Co. Mr. Clancy and Mr. Waller stated that the accounting fee is $50. per month to Mr. Waller.

Mr. Clancy stated the partnership had no other expenses, such as books, auto, entertainment, and/or office supplies. Mr. Clancy stated that if any of these items were incurred, they were very insignificant, and each partner would merely pay the expense without bothering to deduct it.

Other Information

Mr. Clancy stated the partnership has a checking account in the Southern Illinois National Bank, E. St. Louis, Illinois. Mr. Clancy stated the partnership has no other bank accounts such as a savings account. Mr. Clancy stated the only reason for this checking account was to be able to send checks for the wagering tax.

Mr. Clancy stated the partnership has never made any payoffs to any city, county, and/or state officials.

Records are substantially as disclosed in report on wagering tax.

/s/ MARTIN O. MOCHEL
/s/ W. BUESCHER

APPENDIX G

12-13-56

Memorandum of Interview

Thomas D. Clancy

M. O. Mochel and W. L. Buescher Examining Officers

Examination took place in office of Press Waller, Accountant, Murphy Bldg., E. St. Louis, Illinois. Mr. Waller, his partner, Mr. Keeley, and Mr. Clancy were present.

Mr. Clancy stated he is a partner in the Ship's Bell, a tavern, E. St. Louis, Illinois. Mr. Clancy definitely stated he did not accept horse bets in the Ship's Bell Tavern. Mr. Clancy stated he does not work in the Ship's Bell Tavern, and is interested in it only that he might have something to fall back on.

Mr. Clancy stated he has a personal checking account and a personal savings account in the Southern Illinois National Bank, E. St. Louis, Illinois. Mr. Clancy stated he has stock in Associated Funds, an investment house, and bonds from the E. St. Louis and Interurban Water Co. Mr. Clancy stated he has no U.S. Government bonds, no postal savings, and no other accounts of any kind.

Mr. Clancy stated that his income from the above items and from North Sales Co., are his only sources of income.

Mr. Clancy stated that he, personally, had no expense in connection with the North Sales Co., such as, telephone expense or expense with respect to any other horsebook.

/s/ Martin O. Mochel
/s/ W. Buescher

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